On October 26, 2004, JCHC filed a motion to dismiss the appeal as untimely under *Schuurman v. Motor Vessel "Betty K V"*, 798 F.2d 442 (11th Cir. 1986), a case involving a procedurally indistinguishable situation in which a complaint was dismissed and a specific period of time was given to file an amended complaint. As in this case, an amended complaint was not filed within the time provided by the court. The Eleventh Circuit held in *Schuurman* that in such situations, the order of dismissal becomes final for purposes of appeal upon the expiration of the time for amending the complaint, and the time for filing a notice of appeal begins to run upon such expiration. *Id.* at 445.

During the pendency of the appeal to the Eleventh Circuit, the U. S. Department of Justice filed a motion indicating its intention to file a brief for the United States of America as amicus curiae in support of affirmance, and asking for an extension of time within which to file the same. (Resp. Appx. at 2.) However, before the United States' amicus brief in support of affirmance could be filed, the Eleventh Circuit granted JCHC's motion to dismiss the appeal. By order dated January 10, 2005, the appeal was dismissed for lack of jurisdiction because of the failure to file a timely notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A), *Schuurman*, and *Fogade v. ENB Revocable Trust*, 263 F. 3d 1274, 1286 n.9 (11th Cir. 2001). (Pet. Appx. at 22-23.) On January 31, 2005, King filed a petition for rehearing en banc with the Eleventh Circuit, but said petition was denied. (Pet. Appx. at 24.) The Petition for Writ of Certiorari now at issue followed.

REASONS FOR DENYING THE PETITION

Petitioner argues that the Court should grant the petition in this case because the decision of the Eleventh Circuit is "directly contrary" to this Court's rulings in *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), and *United States v. Indrelunas*, 411 U.S. 216, 220 (1973). Petitioner claims that the Eleventh Circuit panel "ignored" such authority by failing to address it in its order dismissing Petitioner's appeal. In so doing, according to Petitioner, the Eleventh Circuit adopted a rule "in direct contradiction to binding authority of this Court[,]" and therefore, Petitioner argues, this Court should grant certiorari to "ensure compliance" with its rulings. (Petition for Certiorari, at p. 5-6.)

Rule 10 of this Court provides that review by way of a writ of certiorari is discretionary, and that petitions for such writs are granted "only for compelling reasons." Petitioner claims that his petition should be granted because this case involves a direct conflict with decisions of this Court and United States courts of appeals. In addition to the fact that the Eleventh Circuit's decision is not "directly contrary" to decisions of this Court or U.S. courts of appeals, there are no compelling reasons for granting the petition for certiorari.

First, this case is of limited significance beyond the parties thereto. The Eleventh Circuit's decision does not create a rule of substantive law applicable to the general public in the Eleventh Circuit that is at odds with the same substantive law of other circuits. Rather, the Eleventh Circuit decided this case on the unique facts and procedural posture presented – a situation that was not present in the opinions cited by Petitioner as being "directly contrary" with the Eleventh Circuit in this case. The unique nature of this case and its limited significance other than to the parties

themselves weigh against granting the petition. *See Layne Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923):

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

See also Singleton et ux. v. Commissioner of Internal Revenue, 439 U.S. 940, 945 (1978) (Blackmun, J., dissenting) ("in allocating judicial resources, I consider it entirely appropriate to disfavor complicated cases which turn largely on unique facts.").

Second, the question presented by the petition is not of an import justifying this Court's review by writ of certiorari. Petitioner does not allege that any constitutional right is implicated in this case, or that the Eleventh Circuit's decision otherwise involves far-reaching consequences of a kind requiring the expenditure of this Court's judicial resources. Even to the extent that the question presented by the petition is somehow important beyond the parties to this case, this does not mean that the petition should be granted. *See Excel Communications, Inc. v. AT&T Corp.*, 528 U.S. 946 (1999) (denying petition for writ of certiorari despite importance of question presented in petition). In fact, it has been noted that when important issues are presented in cases with unique or complex facts, the resolution of such issues may benefit from further consideration by lower courts before being addressed by this Court. *See, e.g., Lackey v. Texas*, 514 U.S. 1045 (1995) (opinion of Stevens, J., respecting denial of certiorari). In this regard, the denial of the petition would not, of course, constitute a ruling on the merits or an endorsement of the decision of the Eleventh Circuit.

See, e.g., Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of certiorari).

Finally, although the decision of the Eleventh Circuit is not "directly contrary" to opinions of this Court, to the extent there is any such conflict, this again does not mandate a grant of certiorari. *See Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1020 (1978) (White, J., dissenting) (discussing numerous cases in which certiorari was denied despite the appearance of conflict with Supreme Court decisions). In fact, this Court has denied certiorari in a case involving similar issues regarding the timeliness of an appeal. *See Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.*, 479 U.S. 966 (1986). Similarly, conflict between the Eleventh Circuit decision and decisions of other United States courts of appeals does not mandate a grant of certiorari. *See id.* at 1017 (White, J., dissenting) (discussing numerous cases in which certiorari was denied despite conflict with other federal or state court decisions). Indeed, certiorari has been denied despite the existence of a "real" or "square" conflict between circuits (as opposed to merely the appearance of a conflict). *See Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting). Moreover, to the extent that there is an actual conflict in this case, the issue is one of procedure, not substantive law such that people in the Eleventh Circuit would be "subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to." *Id.*

In sum, even if the decision of the Eleventh Circuit may be argued to create a conflict with the decisions of other courts, the issue presented is neither substantial enough in its importance nor wide-ranging enough in its effect to warrant review by certiorari. Ultimately, however, contrary to Petitioner's arguments, the decision of the Eleventh Circuit is not in "direct contradiction to binding authority of this Court," as discussed in more detail below.

1. The decision of the Eleventh Circuit is not directly contrary to binding precedent of this Court.

Petitioner's primary argument in support of his Petition for Writ of Certiorari is that the decision of the Eleventh Circuit is contrary to, and therefore precluded by, authority of this Court regarding the "separate document" rule of Federal Rule of Civil Procedure 58. Specifically, Petitioner contends that the Eleventh Circuit's decision is precluded by this Court's opinions in *United States v. Indrelunas*, 411 U.S. 216 (1973), and *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978). However, neither *Indrelunas* nor *Mallis* involved the facts at hand in this case or addressed the specific issue presented in this case, making Petitioner's arguments unavailing.

In dismissing Petitioner's appeal as untimely, the Eleventh Circuit explained that "the appeal period began upon the expiration of the time given by the district court for Appellant to amend his complaint[.]" (Pet. Appx. at 22.) The Eleventh Circuit cited its opinions in *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1286 n. 9 (11th Cir. 2001), and *Schuurman v. Motor Vessel "Betty K V"*, 798 F.2d 442, 445 (11th Cir. 1986), as authority supporting its decision. *Schuurman*, unlike *Indrelunas* and *Mallis*, addressed the specific question raised in this case – "When is a judgment that dismisses a complaint but allows a plaintiff a stated period within which he may amend the complaint final for purposes of appeal." *Schuurman*, 798 F.2d at 443.

In answering this question, the Eleventh Circuit first noted that normally a dismissal of a complaint is not a final order and does not terminate an action unless the court holds that no amendment of the complaint is possible or expressly states that in dismissing the complaint, the action is also being dismissed. *Id.* at 445 (discussing *Czeremcha v. Int'l Assoc.*

of Machinists and Aerospace Workers, 724 F.2d 1552 (11th Cir. 1984)).[1] The Eleventh Circuit then distinguished the circumstances at hand in *Schuurman* and explained:

> In dismissing the complaint, the district court may also provide for a stated period within which the plaintiff may amend the complaint. If the plaintiff does not amend the complaint within the time allowed, no amendment may be made absent leave of court, and the dismissal order becomes final at the end of the stated period. **For appeal purposes, we hold that the order of dismissal in this situation becomes final upon the expiration of the time allowed for amendment. The time for appeal is measured from the date on which the district court order of dismissal becomes final.**

Schuurman, 798 F.2d at 445 (emphasis added).

This discussion is directly on point with the issue in this case, and the Eleventh Circuit correctly made it the basis of its decision to dismiss Petitioner's appeal. Further, in a case subsequent to *Schuurman*, the Eleventh Circuit explained its opinion in *Schuurman* to mean that in addition to being "final" for purposes of appeal, dismissal orders under which the time for amendment has expired are also "entered" for purposes of triggering the time period for filing a notice of appeal under Federal Rule of Appellate Procedure 4(a). *See Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126,

1. In this regard, it is significant that even had the Eleventh Circuit not decided that Petitioner's appeal was untimely due to the fact that it was not filed within 30 days of the expiration of the time for amendment provided in the district court's June 1, 2004, order of dismissal, Petitioner likewise failed to file a notice of appeal within 30 days of the district court's subsequent order of August 26, 2004, that expressly dismissed the "action" with prejudice, thereby leaving no doubt as to finality.

1133 (11th Cir. 1994). The other case cited by the Eleventh Circuit in its decision to dismiss the Petioner's appeal, *Fogade v. ENB Revocable Trust*, 263 F.3d 1274 (11th Cir. 2001), noted the holding in *Schuurman*, but found it to be inapplicable to the facts in that case. However, in discussing *Schuurman* and quoting the language of its holding highlighted above, the Eleventh Circuit made clear in *Fogade* that: "Under our circuit law there is one circumstance in which a Rule 58 separate judgment is not required to start the running of the time for appeal." *Fogade*, 263 F.3d at 1286 n. 9. That circumstance – a dismissal order that allows a specified period of time within which to amend the complaint – was present in *Schuurman* and in this case, but was not present in either *Indrelunas* or *Mallis*. Thus, these cases are distinguishable and conflict does not exist.

Despite the fact that this pivotal circumstance was not present in *Indrelunas* or *Mallis*, Petitioner argues that the decision of the Eleventh Circuit to dismiss his appeal is precluded by *Indrelunas* and *Mallis*. Petitioner cites to the proposition of *Indrelunas* and *Mallis* that a party need not file a notice of appeal until the entry of judgment on a separate document under Rule 58 of the Federal Rules of Civil Procedure. Therefore, Petitioner argues, his failure to file any paper until after the clerk's *sua sponte* entry of a separate document under the heading "Judgment" is permitted notwithstanding any time limitations provided by the trial court in its order of dismissal and notwithstanding his failure to appeal the August 26, 2004, order which dismissed the "action" with prejudice. In addition to the factual distinctions in these cases, there are other reasons why Petitioner's argument misses the mark.

Rule 58, the basis of the *Indrelunas* and *Mallis* decisions, provides, in pertinent part: "Every judgment and amended judgment must be set forth on a separate document[.]"

However, the definition of "judgment" in the Federal Rules of Civil Procedure is not limited to separate documents actually entitled "judgments" such as that entered in this case and relied upon by Petitioner. Specifically, Federal Rule of Civil Procedure 54(a) provides, in pertinent part, that: "'Judgment' as used in these rules includes a decree *and any order from which an appeal lies.*" (emphasis added) Subsequent to *Schuurman*, the Eleventh Circuit applied this definition in *Hertz*, where it was again faced with a situation in which a complaint was dismissed, but leave was granted to amend the complaint within a certain period of time. *See Hertz*, 16 F.3d at 1132. After noting the breadth of the definition of "judgment" as "any order from which an appeal lies[,]" the court stated: "Since the time period for Hertz to amend ended on January 16, the dismissal became appealable under *Schuurman*, and it is properly characterized as a final judgment." *Id.*

Similarly, 28 U.S.C. § 1291 provides that the federal courts of appeals "shall have jurisdiction of appeals from *all final decisions* of the district courts of the United States[.]" (emphasis added). Here again, the use of the language "all final decisions" is not limited to separate final judgments, a fact that is actually implicit (if not explicit) in the language of *Indrelunas* and *Mallis*. *See Indrelunas*, 411 U.S. at 216-17; *Mallis*, 435 U.S. at 383-84. Indeed, it was noted in *Mallis* that "[a] 'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that terms is used in 28 U.S.C. § 1291." *Mallis*, 435 U.S. at 384 n.4.

Moreover, 28 U.S.C. § 2107(a) provides that with limited exceptions not applicable to this case, "no appeal shall bring *any judgment, order or decree* in an action, suit or proceeding of a civil nature before a court of appeals for review *unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.*" (emphasis added) This

provision, setting forth a limitations period for filing an appeal, makes clear that the period begins to run from when the "judgment, order or decree" appealed from is entered. The Eleventh Circuit's opinion in *Schuurman* and its decision in this case are entirely consistent with this statute, as the notice of appeal filed by Petitioner was not filed "within thirty days after the entry of" the order being appealed – the June 1, 2004, order of dismissal, or within thirty days after the expiration of the twenty-day period provided in that order.

Much like 28 U.S.C. § 2107(a), Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides that except in certain limited exceptions not applicable here, in civil cases, "the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment *or order* appealed from is entered." (emphasis added) Of course, the "order being appealed from" in this case was the June 1, 2004, order of dismissal, as is evident from Petitioner's brief filed with the Eleventh Circuit and his Petition to this Court. As an "order from which an appeal lies," the district court's dismissal order of June 1, 2004, constitutes a "final decision" or "judgment" for purposes of appeal under the above statues and Federal Rules of Civil and Appellate Procedure.

The notion that in some circumstances appeals are to be taken from orders or decisions other than actual judgments is not novel, and has been applied in a number of situations. The Advisory Committee Notes to Rule 58 itself contemplate such circumstances. Specifically, the Advisory Committee Notes to the 2002 amendments to the rule provide that in situations in which the "collateral order doctrine" applies: "Appeal time should start to run when the collateral order is entered *without regard to creation of a separate document* and without awaiting expiration of the 150 days provided by Rule 58(b)(2)." (emphasis added) Hence, the notes to the very rule upon which Petitioner relies for the proposition

that a party is always entitled to wait for a separate judgment before filing an appeal reveal that Petitioner's argument is flawed.

In sum, as explained above, the Eleventh Circuit's opinion in *Schuurman* and its decision in this case were expressly predicated upon facts not present in *Indrelunas* or *Mallis*, and are therefore not in direct conflict with *Indrelunas* and *Mallis*. To the contrary, the Eleventh Circuit's decisions can be harmonized with this Court's precedent, and have ample support in the Federal Rules of Civil and Appellate Procedure. In this regard, Petitioner relies almost exclusively upon Rule 58, but does not discuss the definition of "judgment," an essential term of the rule. Further, throughout his argument, Petitioner quotes language from *Indrelunas* and *Mallis* relating to Rule 58, but the removal of this language from the factual context from which it came hides the fact that the circumstances and procedural posture of those cases are distinguishable from this case. The pivotal circumstance upon which the decisions in *Schuurman* and in this case turned is the dismissal order's provision of a specific period of time within which to file an amended complaint. Here, as in *Schuurman*, Petitioner failed to file an amended complaint within the time expressly provided by the district court. Upon expiration of this time, the dismissals became "final decisions" or "judgments" for purposes of appeal under the Federal Rules of Civil and Appellate Procedure and specifically applicable Eleventh Circuit precedent. Petitioner has not shown that such precedent is in conflict with or otherwise precluded by opinions of this Court.

Even assuming, *arguendo*, that the Eleventh Circuit's decision may in some way seem inconsistent with certain language used in opinions of this Court, the decisions are not in direct conflict with actual holdings of those opinions

as argued by Petitioner. Moreover, certiorari has previously been denied by this Court in a case involving the "separate document" requirement of Rule 58, and Petitioner has shown no compelling reason why this case should be different. *See Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.*, 479 U.S. 966 (1986).

2. Nor does inter-circuit conflict justify granting the Petition for Writ of Certiorari.

Petitioner also argues that alleged conflict between the Eleventh Circuit's decision in this case and decisions of other circuits justifies the grant of his Petition. This argument is unavailing primarily because, here again, the cases cited by Petitioner are not on point with this case. However, even to the extent that an inter-circuit conflict has been created, this does not mandate the granting of the Petition, and indeed, no compelling reason for doing so has been advanced as is required by Rule 10 of this Court.

Save one, none of the cases cited by Petitioner in support of his inter-circuit conflict argument involved the key circumstance of a dismissal order setting forth a specific period of time within which to amend a complaint or meet some other condition. Rather, as with *Indrelunas* and *Mallis*, Petitioner merely excerpts certain language from other circuit cases in which the courts have noted Rule 58's "separate document" requirement. However, different passages in these cases and others make it abundantly clear that Rule 58 does not absolutely require a formal separate "judgment" in all circumstances. *See, e.g., Otis v. City of Chicago*, 29 F.3d 1159, 1165 (7th Cir. 1994); *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994) (holding that an Administrative Closing Order providing 60 days in which the parties could reopen proceedings "matures into a final judgment and, if no action is taken to resolve the case, satisfies the separate document requirement of Rule 58.")

The Third Circuit, in *Shapiro v. UJB Financial Corp.*, 964 F.2d 272 (3d Cir. 1992), noted this Court's directive of employing a "practical rather than a technical construction" of the finality requirement of 28 U.S.C. § 1291, and reaffirmed its previous holding that "a plaintiff can convert a dismissal with leave to amend into a final order by electing to stand upon the original complaint." *Id.* at 278 (quoting *Cohen v. Beneficial Indus. Loan. Corp.*, 337 U.S. 541, 546 (1949)). Here, Petitioner "elected not to file an amended complaint" (Pet. at 3), but instead of taking a timely appeal after making such election, or moving the court for entry of final judgment, Petitioner did nothing. Petitioner then had additional opportunities to file a notice of appeal, but consistently failed to do so. Under Petitioner's argument, had the clerk not *sua sponte* entered a separate judgment, the time limit for filing an appeal in this case would never have begun, and, taken to its logical conclusion, may never begin or end.

The only circuit case cited by Petitioner with facts at all analogous to this case is *Otis v. City of Chicago*, 29 F.3d 1159 (7th Cir. 1994). In *Otis*, the trial court entered an order dismissing the plaintiff's case but allowing for reinstatement of the case if certain conditions were met within a specified time period. *See Id.* at 1162. The plaintiff did not meet the conditions within the time period, but upon expiration of the period, the court took no further action. *Id.* However, unlike Petitioner, the plaintiff in *Otis* filed a timely notice of appeal thirty days after the expiration of the time period specified in the dismissal order. *Id.* Therefore, notwithstanding any similarity between the dismissal orders entered in *Otis* and this case, *Otis* is entirely distinguishable from this case insofar as the plaintiff in *Otis* filed a timely appeal.

Notwithstanding this glaring and critical difference between this case and *Otis*, Petitioner asserts that *Otis* involved "nearly identical facts." (Pet. at 16) Petitioner then cites to language in *Otis* discussing *Indrelunas* and *Mallis*' application of the "separate document" requirement of Rule 58, and argues that the decision of the Eleventh Circuit "is directly contrary to the Supreme Court's authority, and thus creates a conflict with those circuits, including the Seventh, that uphold such authority." (Pet. at 17) Hence, Petitioner is simply restating his argument that the Eleventh Circuit's decision is contrary to *Indrelunas* and *Mallis*, upon which he then premises the additional argument that the Eleventh Circuit's decision must therefore be contrary to any circuit court opinion upholding *Indrelunas* and *Mallis*. Not only is there a disconnect in this argument, but it is also premised upon an incorrect underlying assertion that the Eleventh Circuit's decision is contrary to *Indrelunas* and *Mallis*, the inaccuracy of which is discussed above.

Furthermore, there is other discussion in *Otis* that would support the result in *Schuurman* and in this case. Specifically, the defendant in *Otis* argued that under 28 U.S.C. § 2107(a)'s provision that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree[,]" the plaintiff's notice of appeal should have been filed by August 14, 1991, thirty days after the dismissal order being appealed was entered in the docket on July 15, 1991. *Otis*, 29 F.3d at 1167. The Seventh Circuit disagreed based on its conclusion that "entry" of the order occurs "on the date the condition is satisfied or the time to satisfy it ends." *Id.* As noted above, the Eleventh Circuit agreed with this conclusion in *Hertz*, where it further refined its holding in *Schuurman* to mean that dismissal orders under which the time for amendment has expired are "entered" for purposes

of triggering the time period for filing a notice of appeal. *See Hertz*, 16 F.3d at 1133. *See also Fogade*, 263 F.2d at 1286 n.9 (citing *Otis* alongside *Schuurman* and *Hertz* as examples of circumstances where a separate judgment is not required to start the running of the limitations period for filing an appeal).

Ultimately, the Seventh Circuit ruled that the plaintiff's notice of appeal in *Otis* was timely because it was filed within 30 days after the order appealed from was "entered" under the aforementioned construction of the term "entry." *Otis*, 29 F.3d at 1167-68. The court explained that 28 U.S.C. § 2107 "is designed to restrict parties to 30 days from the entry of an appealable order to take an appeal, not to ensure that the time for appeal ends before the opportunity to appeal begins. Otis appealed within the 30 days of the time the district court's order became appealable." *Id.* at 1168. This is not the case here, where Petitioner took no action during the 30-day appeal period following the expiration of the time provided by the court in its dismissal order, marking the "entry" thereof. Hence, Petitioner's reliance upon *Otis* as "reach[ing] the precisely opposite conclusion under nearly identical facts" (Pet. at 16) is simply incorrect.

Petitioner has not shown that an inter-circuit conflict has been created by the Eleventh Circuit's decision. However, to the extent that the Eleventh Circuit's decision does conflict with an opinion of another circuit, any such conflict is not so significant as to justify the grant of the Petition in this case. *See Layne Bowler Corp.*, 261 U.S. at 393:

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real

and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Being solely an issue of procedure, this case has little, if any, appreciable effect on the substantive law of the Eleventh Circuit as compared to other circuits. Stated differently, the effect of this case is not such that citizens of the Eleventh Circuit will be "subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to." *See Beaulieu v. United States*, 497 U.S. at 1039 (White, J., dissenting).

3. The decision of the Eleventh Circuit is not otherwise improper.

Aside from reiterations of the argument that the Eleventh Circuit's decision conflicts with *Indrelunas* and *Mallis*, the remainder of the Petition argues that the Eleventh Circuit did not address *Indrelunas* and *Mallis*, and that the Eleventh Circuit relied upon dicta in deciding this case, thereby creating a new Eleventh Circuit rule. In addition to being flawed in certain respects, these arguments do not present compelling reasons for granting the Petition.

Initially, the argument that the Eleventh Circuit did not address *Indrelunas* and *Mallis* in deciding this case does not justify changing the outcome in light of the fact that *Indrelunas* and *Mallis* are not on point with this case, as explained above. Secondly, Petitioner's argument notwithstanding, it cannot be said with any certainty that the Eleventh Circuit "ignored" this Court's opinions in *Indrelunas* and *Mallis* simply because it did not discuss them. Indeed, the Eleventh Circuit decision does not contain discussion of any cases, even the ones cited therein. It simply cites *Schuurman* and *Fogade* as support for its decision without discussing them. Moreover, in responding to JCHC's

motion to dismiss his appeal to the Eleventh Circuit, Petitioner made the exact same arguments he now makes regarding *Indrelunas*, *Mallis*, and Rule 58. Hence, it is specious at best to claim, as Petitioner does, that the Eleventh Circuit ignored these cases simply because they were not discussed by the court in its decision.

Moreover, although *Indrelunas* and *Mallis* were not applicable to the facts in *Schuurman*, and accordingly not discussed therein, *Fogade* (the other case cited by the Eleventh Circuit in its decision) does discuss cases and issues raised by Petitioner. Specifically, Rule 58 and cases applying its "separate document" requirement were cited in *Fogade* because of their applicability in that case. *See Fogade*, 263 F.3d at 1286. However, the court also noted the specific exception to the general rule: "Under our circuit law there is one circumstance in which a Rule 58 separate judgment is not required to start the running of the time for appeal." *Fogade*, 263 F.3d at 1286 n.9 (referring to *Schuurman*). In other words, the Eleventh Circuit has readily acknowledged and applied the principles set forth in *Indrelunas* and *Mallis* to cases in which they apply, and the fact that these cases were not discussed by the Eleventh Circuit in its decision in this case does not mean that they were "ignored" as Petitioner claims. Rather, as in *Schuurman*, they were not applicable to the circumstances at hand.

Petitioner also contends that the Eleventh Circuit relied upon dicta from its prior opinions in deciding to dismiss Petitioner's appeal, and that the holdings of the cases relied upon by the Eleventh Circuit actually support his position. These contentions are belied by the clear language of *Schuurman*:

> For appeal purposes, **we hold** that the order of dismissal in this situation becomes final upon the

> expiration of the time allowed for amendment. The time for appeal is measured from the date on which the district court order of dismissal becomes final.

Schuurman, 798 F.2d at 445 (emphasis added).

This language is the crux of the *Schuurman* opinion, and in fact is expressly announced as a "holding" by the court. While the mention of *Schuurman* in *Fogade* is made in a footnote and is admittedly not part of a holding of that case, this is because, as explained above, *Schuurman* was not applicable to the facts of *Fogade*. Moreover, *Fogade* simply explained the holding of *Schuurman*, and did not purport set forth any holding or decisional law based upon *Schuurman*. Thus, Petitioner's argument that the Eleventh Circuit's decision to dismiss his appeal was premised upon dicta is erroneous.

Finally, notably absent from Petitioner's argument is any claim that he was deprived of the opportunity to appeal the district court's dismissal of his case. To the contrary, King was given multiple chances to follow the explicit instructions of the district court, and numerous opportunities to appeal the dismissal of his complaint. Specifically, King had the opportunity to amend his FCA claim against Quorum to plead with the requisite particularity, but failed to do so. The claim against Quorum, which arose out of the same facts as the claim against JCHC, was instead dismissed with prejudice. King then brought a similarly deficient FCA claim against JCHC that was also dismissed. Again King failed to file an amended complaint within the time given by the district court despite being expressly informed of the inadequacies of his pleading. Of course, King could also have chosen to stand by his allegations in the First Amended Complaint and taken an appeal of the district court's decision to dismiss the same

without waiting for the 20-day period given by the court to expire. But he did not do so. Nor did he file a notice of appeal during the 30-day period following the expiration of the time for amendment set forth in the district court's order of dismissal. Although the dismissal order was final for purposes of appeal at this point, the district court thereafter entered an order dismissing the action with prejudice on August 26, 2004. Again, King failed to file a notice of appeal within 30 days of the entry of this order.

Under Petitioner's argument, had the clerk not eventually *sua sponte* entered a judgment, the time limit for filing an appeal in this case would never have begun, and in fact would never begin or end. Such a result is contrary to the express language as well as the purpose of Federal Rule of Appellate Procedure 4(a) and 28 U.S.C. § 2107. This Court has noted in reference to Rule 4(a) and 28 U.S.C. § 2107 that:

> The purpose of the rule is clear: It is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 264 (1978) (quoting *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943)).

The result here, like *Schuurman*, prevents a situation such as that advanced by Petitioner, where the time for filing an appeal could run indefinitely, leaving a potential appellee to wonder if, and when, it is no longer subject to further litigation. Similarly, the result prevents a plaintiff from

manipulating procedural rules, a concern expressed in *Schuurman* and elsewhere. *See Schuurman*, 798 F.2d at 445-46; *Otis*, 29 F.3d at 1165.

In petitioning this Court for certiorari relief, Petitioner is effectively asking this Court to ignore his repeated failure to properly plead under the Federal Rules of Civil Procedure, and to likewise excuse his additional failure to file a timely notice of appeal despite having multiple opportunities to do so. As the only ultimate relief that would allow King's case to proceed is a holding that the First Amended Complaint was legally sufficient and can stand without amendment, Petitioner is in effect arguing that the First Amended Complaint is satisfactory despite its failure to plead with particularity and failure to state a cause of action. These pleading deficiencies cannot simply be ignored. Even the U.S. Government, against whom false claims were allegedly made, would argue for affirmance of the dismissal of this case. Compelling reasons for granting the Petition under Supreme Court Rule 10 do not exist in this case.

CONCLUSION

Petitioner's arguments in support of his Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals are unsound for the reasons set forth above. Ultimately, however, regardless of the merits of Petitioner's arguments, compelling reasons for the grant of certiorari relief do not exist in this case. Accordingly, certiorari should be denied.

Respectfully submitted,

JOHN BERANEK
Counsel of Record
MICHAEL J. GLAZER
AUSLEY & MCMULLEN
Post Office Box 391
227 South Calhoun Street
Tallahassee, Florida 32302
(850) 224-9115

Attorneys for Respondent

APPENDIX

APPENDIX A — NOTICE OF APPEAL FILED BY PETITIONER WITH DISTRICT COURT ON SEPTEMBER 28, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

No. 5:99CV73 SPM

UNITED STATES OF AMERICA
ex rel. JOHN A. KING, D.O.

Plaintiff,

vs.

JACKSON COUNTY HOSPITAL, INC. of MARIANNA, FLORIDA; QUORUM HEALTH RESOURCES, L.L.C.,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that John A. King, D.O., Plaintiff/ Relator in the above named case ("Plaintiff"), hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Judgment entered in this case on August 31, 2004 (docket no. 147), the Order entered in this case on August 27, 2004 (docket no. 146), and the Order entered in this case on June 2, 2004 (docket no. 146), dismissing Plaintiff's Complaint against Defendant Jackson County Hospital Corporation (doc. 145).

Respectfully submitted this 28th day of September, 2004.

Appendix A

BOTHWELL & SIMPSON, P.C.

s/ Mike Bothwell
Mike Bothwell
Georgia Bar No. 069920
G. Mark Simpson
Georgia Bar No. 647725
Attorneys for Plaintiff

304 Macy Drive
Roswell, Georgia 30075
(770) 643-1606

APPENDIX B — MOTION OF THE UNITED STATES FOR EXTENSION OF TIME WITHIN WHICH TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE FILED DECEMBER 28, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15178-B

USDC Case No. 5:99cv73 SPM

UNITED STATES OF AMERICA, *ex rel.*
JOHN A. KING,

Plaintiff- Appellant,

v.

JACKSON COIJHTY HOSPITAL,

Defendant-Appellee.

MOTION OF THE UNITED STATES FOR EXTENSION OF TIME WITHIN WHICH TO FILE BRIEF AS AMICUS CURIAE

The United States moves for a forty-day extension of time, to and including February 9, 2005, within which to file a brief as amicus curiae in this case in support of affirmance. The grounds for this motion are as follows:

1. The brief for appellant in this case was filed on November 17, 2004. Appellee's responsive brief was filed on December 17, 2004. A brief by the United States as amicus curiae supporting the appellee would therefore be due on December 29, 2004.

Appendix B

2. This case is a *qui tam* action under the False Claims Act, 31 U.S.C. 3729 *et seq.*, and is before the Court on the relator's appeal from a dismissal of his action. Among other things, the action charges Jackson County Hospital filed false claims with Medicare by (1) charging for medical equipment which it was not licensed to supply, (2) over-billing for anesthesia services, (3) allowing employees to submit inaccurate time cards, and (4) offering "prompt pay" discounts on beneficiaries' co-payment obligations – all in violation of the False Claims Act. The district court dismissed the action with prejudice, entering final judgment in favor of the defendant. Relator's appeal concerns only the third set of allegations noted above.

3. Resolution of the issues in this case could have a substantial impact on the scope of permissible claims and liability under the False Claims Act.

4. Given the importance of the issues raised by this case to the Government's implementation of, and ability to recover under, the False Claims Act, consultations between the affected agencies and the relevant components of the Department of Justice, including the Civil Division and the Office of the Solicitor General, must take place. Following those consultations, the Solicitor General must authorize any amicus participation by the United States. 28 C.F.R. 0.20(c). Moreover, the upcoming holidays and leave scheduled by persons within the affected agencies and Department of Justice are affecting the Government's ability to confer regarding issues raised by the district court's order and relator's appeal. In light of the foregoing, it will not be possible to complete the amicus decision process and (if our participation is authorized by the Solicitor General) to prepare an amicus brief by the current deadline.

5. Oral argument has not yet been scheduled in this case, and we will inform the Court and the parties immediately if the Solicitor General should decide not to authorize the Government's participation as amicus in this case.

6. Because this Court's resolution of the issues presented in this appeal could have a profound effect on the scope of the False Claims Act and the Government's interests under it, we believe that the views of the United States could be helpful to the Court in its determination of the issues raised here.

7. Counsel for defendant-appellee, Jackson County Hospital, John Beranek, has informed us that he has no opposition to this motion. Counsel for the relator, Michael Bothwell, has not informed us whether he will oppose this motion.

Respectfully submitted,

s/ Douglas N. Letter
DOUGLAS N. LETTER
(212) 514-3602
Appellate Litigation Counsel
JUSTIN DRAYCOTT
(202) 305-9300
Attorney, Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 261 Ben Franklin Station
Washington, D.C. 20044